

EXHIBIT 9

Honorable Thomas S. Zilly

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

GREENPEACE, AMERICAN OCEANS CAMPAIGN,
and SIERRA CLUB,

Plaintiffs,

v.

Civ. No. C98-0492Z

NATIONAL MARINE FISHERIES SERVICE, and
WILLIAM M. DALEY, in his official capacity as
Secretary, United States Department of Commerce,

Defendants, and

AT-SEA PROCESSORS ASSOCIATION,
WESTWARD SEAFOODS, INC.,
UNITED CATCHER BOATS, and
ALEUTIAN EAST BOROUGH, et al.,

Defendant-Intervenors.

**FEDERAL DEFENDANTS' RESPONSE TO PLAINTIFFS' NOTICE OF FILING OF
PROPOSED INJUNCTION ORDER**

Federal defendants submit the following four points in response to the plaintiffs' proposed injunction order, as directed by the Court in its Order entered on July 20, 2000 (July 20 Order).

1. Limitation to federal waters - The proposed injunction refers to "groundfish trawl fishing authorized pursuant to the Fishery Management Plans for the Bering Sea/Aleutian Island and Gulf of Alaska,..." Federal defendants understand that this language applies to all federally regulated waters of the "exclusive economic zone," as defined at 16 U.S.C. § 1802(11), and does not apply to state waters regulated by the State of Alaska. Federal defendants have discussed this point with plaintiffs and defendant-intervenors and all parties concur in this understanding.

FED. DEF. RESP. TO PL. NOT. OF FILING
OF PROPOSED INJUNCTION ORDER

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Environment and Natural Resources Division
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1 2. Statutory exemption for scientific research - The court's July 20 Order and the
 2 plaintiffs' proposed injunction apply to all "groundfish trawl fishing" within designated critical
 3 habitat west of 144 degrees W. longitude. Under the Magnuson-Stevens Act, the term "fishing" as
 4 defined by Congress "does not include any scientific research activity which is conducted by a
 5 scientific research vessel." 16 U.S.C. § 1802(15). Accordingly, while the court's injunction will
 6 enjoin all commercial groundfish trawl fishing, it will not apply to scientific research activity that
 7 the National Marine Fisheries Service (NMFS) conducts, authorizes, or permits in the eastern North
 8 Pacific Ocean.

9 This continuing scientific research is necessary to obtain important information regarding
 10 the fishery resources and prey bases for Steller sea lions, among other research objectives. On July
 11 28, 2000, NMFS provided the attached list of ten planned scientific research activities (attached as
 12 Exhibit 1) to counsel for the plaintiffs and defendant-intervenors. As Exhibit 1 makes clear, some
 13 of the scheduled research includes trawling inside designated critical habitat areas for the Steller sea
 14 lion, although the estimated take of groundfish is extremely small (approximately 1,176 tons) when
 15 compared to the total allowable catch of groundfish of 2.3 millions tons. NOAA conducts its
 16 research on both NOAA vessels and chartered vessels, although the latter are required to adhere to
 17 the agency's scientific protocols. Research is scheduled to begin on August 8, 2000, with five
 18 activities this fall and the other five next spring and summer.

19 Although this scientific research is not covered by the statutory definition of "fishing" and
 20 therefore is excluded by statute from the court's injunction, the federal defendants want to avoid any
 21 question regarding the propriety of continuing its scientific research efforts regarding groundfish
 22 fishing impacts on the Steller sea lion. Accordingly, NMFS has conferred with plaintiffs and
 23 plaintiffs are in agreement that the proposed order of injunction previously submitted by plaintiffs
 24 should be amended to reflect that the term "fishing" is used as defined in the Magnuson-Stevens Act.
 25 A revised proposed Injunction is attached for the Court's convenience.

26 3. Timing of the Injunction - The court's July 20 Order and the plaintiffs' proposed
 27

1 injunction specify that the injunction will become effective at noon, P.D.T., on August 8, 2000.
2 Federal defendants recognize and appreciate that the court has provided advance notice of the
3 injunction, but nevertheless request that the court consider a brief delay of seven days from entry of
4 the injunction order to enable the agency to implement the court's injunction through a duly
5 promulgated notification published in the Federal Register. The purpose of this additional, brief
6 delay is to enable NMFS to provide both actual notice and binding legal notice of the exact terms
7 and scope of the injunction to all affected persons. This notice is essential to ensure that NMFS can
8 enforce the terms of the court's injunction so that no one engages in trawl fishing within critical
9 habitat in contravention of the court's order. The notice will take several forms, including
10 publishing a Federal Register notice or rule, radio broadcasts on the NOAA weather channel, and
11 notice letters to processors and fishing associations in remote areas of the Gulf of Alaska, Aleutian
12 Islands, and Bering Sea fishing communities.

13 At the hearing held on June 20, 2000, counsel for the federal defendants advised the court
14 that NMFS would need from seven to ten days to provide effective "actual notice to the fishermen
15 once the injunction was received." Transcript of June 20, 2000, hearing at 86-87. Given the advance
16 notice as to the general substance of the court's ruling, NMFS has been working diligently since July
17 20 to prepare the necessary Federal Register documents, which are nearly complete, but the agency
18 obviously cannot know the precise terms and conditions of the injunction until the court actually
19 enters the forthcoming order, sometime between receipt of this response and noon on August 8.

20 Federal defendants commit to the court that the agency will act as quickly and diligently as
21 possible upon receiving the court's order to provide actual notice to all affected persons, along with
22 legal notice through publication in the Federal Register. An additional period of time, however, up
23 to seven days, is warranted to implement the injunction in a way that will ensure full and accurate
24 notice and prompt compliance. The added time should minimize or eliminate the need for the
25 agency to engage in separate enforcement proceedings against any person found to be trawl fishing
26 in violation of the court's order.

1 4. Duration of the Injunction – The plaintiffs' proposed injunction states that "until further
2 order of this Court," the injunction will remain in place. The purpose of the injunction is to prevent
3 commercial trawl fishing within the Steller sea lion's critical habitat until NMFS has completed a
4 comprehensive BiOp that explains "how the various groundfish fisheries and fishery management
5 measures interrelate and how the overall management regime may or may not affect Steller sea lion
6 survival and recovery." July 20 Order at 20. Once NMFS has completed that consultation and
7 issued the FMP BiOp, then the basis for imposing the injunction -- to ensure substantial procedural
8 compliance with the ESA's section 7 duty to consult in order to avoid likely jeopardy and adverse
9 modification of critical habitat -- no longer will exist. Accordingly, federal defendants request that
10 the court limit the duration of the injunction to the pendency of the ongoing ESA section 7
11 consultation.

12 This approach is consistent with the litigation schedule that the parties have submitted. After
13 the July 20 Order was entered, the parties collectively submitted a Status Report on July 27, 2000,
14 which advises the court of the proposed litigation schedule for the remainder of this case. That
15 schedule contemplates that NMFS will issue its final FMP biological opinion (BiOp) on October 31,
16 2000, and specifies that any party thereafter may seek expedited relief to challenge that BiOp. Status
17 Report at 2. The federal defendants will commit to an expeditious schedule to brief any subsequent
18 challenges to the forthcoming BiOp, but respectfully submit that the October 31 comprehensive FMP
19 BiOp, once issued, should be entitled to a presumption of legitimacy, so that any party contesting
20 that BiOp would bear the customary burden under the Administrative Procedure Act of proving that
21 NMFS has acted in an arbitrary and capricious manner. In sum, the injunction should continue in
22 force and effect until NMFS has issued its new BiOp, but then should expire as of the date on which
23 the agency has taken its final agency action. Thereafter, the BiOp would be subject to any
24 subsequent challenge and further ruling by this court.

25 Respectfully submitted this 4th day of August, 2000.


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